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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11 ROY L. LOWE, JR., a single man,  
12                   Plaintiff,  
13                  v.  
14 AETNA LIFE INSURANCE COMPANY,  
15                  Defendant.

16                   CASE NO. C09-5079RJB

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18                   **ORDER ON DEFENDANT  
AETNA' MOTION TO  
DISMISS STATE LAW  
CLAIMS AND CONFIRM  
NON-JURY TRIAL AND  
PLAINTIFF'S MOTION FOR  
EXTENSION OF TIME**

19                  This matter comes before the Court on Defendant Aetna Life Insurance Company's  
20 ("Aetna") Motion to Dismiss State Law Claims and Confirm Non-Jury Trial, (Dkt. 10) and  
21 Plaintiff's Motion and Declaration to Extend Time for Plaintiff's Response (Dkt. 14). The Court  
22 has considered the pleadings filed in support of and in opposition to the motion and the file herein.

23                   **I. FACTUAL AND PROCEDURAL BACKGROUND**

24                   **A. FACTS**

25                  On February 12, 2009, Aetna removed this case from Pierce County, Washington,  
26 Superior Court, alleging that the life insurance policy at issue was covered by the Employee  
27 Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et. seq.* Dkt. 1.

1 Plaintiff's Complaint alleges that, as an employee benefit through his employer, he maintained a  
2 policy of insurance on the life of his wife. Dkt. 1-2, at 5. Plaintiff acknowledges that “[t]he  
3 insurance policy at issue, being an employee benefit, is governed under federal law by ERISA.”  
4 *Id.* Plaintiff alleges that the “policy of insurance issued by Defendant provided . . . a ‘double  
5 indemnity’ provision, which in the case of Plaintiff provided an additional death benefit of  
6 \$100,000.00 if the death of his wife occurred through accident.” *Id.* Plaintiff alleges Defendant  
7 remitted the face amount of the policy, but failed to pay the accidental death benefit. *Id.*, at 6.  
8 Plaintiff claims that he is “entitled to payment of the accidental death benefit in the sum of  
9 \$100,000.00,” makes a state law “demand for settlement in accordance with RCW 48.30.015,”  
10 and seeks damages. *Id.*, at 6-8.

11 RCW 48.30.015 provides,

12 (1) Any first party claimant to a policy of insurance who is unreasonably denied a  
13 claim for coverage or payment of benefits by an insurer may bring an action in the  
14 superior court of this state to recover the actual damages sustained, together with  
the costs of the action, including reasonable attorneys' fees and litigation costs, as  
set forth in subsection (3) of this section.

15 (2) The superior court may, after finding that an insurer has acted unreasonably in  
16 denying a claim for coverage or payment of benefits or has violated a rule in  
subsection (5) of this section, increase the total award of damages to an amount  
not to exceed three times the actual damages.

17 (3) The superior court shall, after a finding of unreasonable denial of a claim for  
18 coverage or payment of benefits, or after a finding of a violation of a rule in  
subsection (5) of this section, award reasonable attorneys' fees and actual and  
statutory litigation costs, including expert witness fees, to the first party claimant  
of an insurance contract who is the prevailing party in such an action.

19 (4) “First party claimant” means an individual, corporation, association,  
20 partnership, or other legal entity asserting a right to payment as a covered person  
under an insurance policy or insurance contract arising out of the occurrence of the  
contingency or loss covered by such a policy or contract.

21 (5) A violation of any of the following is a violation for the purposes of  
subsections (2) and (3) of this section:

22 (a) WAC 284-30-330, captioned “specific unfair claims settlement practices  
defined”;

23 (b) WAC 284-30-350, captioned “misrepresentation of policy provisions”;

24 (c) WAC 284-30-360, captioned “failure to acknowledge pertinent  
communications”;

25 (d) WAC 284-30-370, captioned “standards for prompt investigation of claims”;

26 (e) WAC 284-30-380, captioned “standards for prompt, fair and equitable  
settlements applicable to all insurers”; or

27 (f) An unfair claims settlement practice rule adopted under RCW 48.30.010 by the  
insurance commissioner intending to implement this section. The rule must be  
codified in chapter 284-30 of the Washington Administrative Code.

28 (6) This section does not limit a court's existing ability to make any other determination regarding

1 an action for an unfair or deceptive practice of an insurer or provide for any other remedy that is  
2 available at law.

3 (7) This section does not apply to a health plan offered by a health carrier. "Health  
4 plan" has the same meaning as in RCW 48.43.005. "Health carrier" has the same  
5 meaning as in RCW 48.43.005.

6 (8)(a) Twenty days prior to filing an action based on this section, a first party  
7 claimant must provide written notice of the basis for the cause of action to the  
8 insurer and office of the insurance commissioner. Notice may be provided by  
9 regular mail, registered mail, or certified mail with return receipt requested. Proof  
10 of notice by mail may be made in the same manner as prescribed by court rule or  
11 statute for proof of service by mail. The insurer and insurance commissioner are  
12 deemed to have received notice three business days after the notice is mailed.

13 (b) If the insurer fails to resolve the basis for the action within the twenty-day  
14 period after the written notice by the first party claimant, the first party claimant  
15 may bring the action without any further notice.

16 (c) The first party claimant may bring an action after the required period of time in  
17 (a) of this subsection has elapsed.

18 (d) If a written notice of claim is served under (a) of this subsection within the time  
19 prescribed for the filing of an action under this section, the statute of limitations for  
20 the action is tolled during the twenty-day period of time in (a) of this subsection.

## B. PENDING MOTIONS

21 Aetna now moves for dismissal of Plaintiff's state law claims pursuant to Fed. R. Civ. P.  
22 12(b)(6) arguing that ERISA preempts Plaintiff's state law claims. Dkt. 10. Aetna also seeks  
23 confirmation that the trial will be a non-jury trial and moves for attorneys fees and costs as a result  
24 of having to bring the motion. *Id.* Aetna's motion was noted for consideration on June 19, 2009.

25 On June 19, 2009, after Aetna filed its Reply, Plaintiff filed a Motion to Extend Time for  
26 his Response. Dkt. 14. Plaintiff then filed Response on June 24, 2009. Dkt. 16. Plaintiff argues  
27 that even though ERISA contains a broad preemption clause, it exempts from preemption State  
28 laws which "regulate" insurance, referred to as the "savings" clause, 28 U.S.C. § 1144(b)(2)(A).  
Dkt. 16. Plaintiff goes on to note that under ERISA's "deemer" clause, 28 U.S.C. § 1144(b)(2)(B):

Neither an employee benefit plan described in section 1003(a) of this title, which is  
not exempt under section 1003(b) of this title (other than a plan established  
primarily for the purpose of providing death benefits), nor any trust established  
under such a plan, shall be deemed to be an insurance company or other insurer,  
bank, trust company, or investment company or to be engaged in the business of  
insurance or banking for purposes of any law of any State purporting to regulate  
insurance companies, insurance contracts, banks, trust companies, or investment  
companies.

1 Accordingly, Plaintiff reasons, that as a “plan established primarily for the purpose of providing  
2 death benefits” the here plan could be “deemed” to be an “insurance company” and accordingly,  
3 the Court needs to determine whether the exception in 29 U.S.C. § 1144 (b)(2)(A) applies to his  
4 state law claims under RCW 48.30.015, as laws which “regulate” insurance. Dkt. 16.

Upon review of this matter, the Court notes that the Ninth Circuit Court of Appeals has addressed whether certain state laws “regulate” insurance in considering questions of ERISA preemption. One such case is *Elliot v. Fortis Benefits Insurance Co.*, 337 F.3d 1138 (9th Cir. 2003).

9           Based upon Plaintiff's late filing of the Response, Defendant did not have an opportunity  
10 to reply.

## **II. DISCUSSION**

Under Fed. R. Civ. P. 6(b), the Court, for good cause, may grant an extension of time. In the interest of due process, Plaintiff's Motion and Declaration to Extend Time for Plaintiff's Response (Dkt. 14) should be granted. In an effort to reach the merits of this case, Plaintiff's Response should be considered. Due to the fact that Defendant timely filed its Reply, but did so before any response was filed, it should be permitted, if it so chooses, to file an additional seven page Reply, addressing the issues raised in Plaintiff's Response, on or before July 17, 2009. Defendant's Motion to Dismiss State Law Claims and Confirm Non-Jury Trial (Dkt. 10) should be renoted to July 17, 2009.

### III. ORDER

Therefore, it is hereby, **ORDERED** that:

- 22 • Plaintiff's Motion and Declaration to Extend Time for Plaintiff's Response (Dkt. 14) is  
23 **GRANTED**,  
24 • Defendant's Motion to Dismiss State Law Claims and Confirm Non-Jury Trial (Dkt. 10) is  
25 **RENOTED** to July 17, 2009; and  
26 • Defendant's supplemental reply, if any, **SHALL** be filed on or before July 17, 2009.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel

1 of record and to any party appearing *pro se* at said party's last known address.

2 DATED this 6th day of July, 2009.  
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7 Robert J Bryan  
United States District Judge  
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